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IN THE HIGH COURT OF JUDICATURE AT BOMBAY@@
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CRIMINAL APPELLATE JURISDICTION.@@
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CRIMINAL APPEAL NO.141 OF 1989@@
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The State of Maharashtra] Appellant.
versus
1. Sanjay Sadu alias Bhau Dalvi]
age 23 years, residing at]
Ganesh Teli Chawl, Old Bombay]
Road, Thane]
2. Arun Ashok Nakhate,]
age 20 years, residing at]
Chandra Patil Chawl,]
Old Bombay Road, Thane]
3. Krishna Shankar Patil]
age 22 years, residing at]
Talav Pali Road, Thane]
4. Santosh Bhagwan Ambekar]
age 22 years, residing at]
Chandra Patil Chawl, Thane]
5. Vasant Tukaram Dalvi]
age 22 years, residing at]
Subhash Khande Chawl,]
Kharkar Ali, Thane]

6. Ajit Mukund Joshi]
residing at near Vaidya]
Vakhar, Raghoba Shankar] Respondents.
Road, Chandani, Thane]

Mr.V.B.Konde-Deshmukh, APP, for the State.
Mr.S.V.Kotwal, advocate appointed for the respondents/accused.

ALONG WITH@@
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CRIMINAL APPEAL NO.985 OF 1988@@
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Ajit Mukund Joshi]
at present in Thane Central]
Prison Res.Near Vaidya Vakhar,]
Raghoba Shankar Road, Chendani]
Thane, Dist.Thane] Appellant.
versus
The State of Maharashtra] Respondent.

Mr.S.V.Kotwal, advocate appointed for the

appellant/accused.
Mr.V.B.Konde-Deshmukh, APP, for the State

CORAM : D.G.DESHPANDE@@
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V.K.TAHILRAMANI JJ.@@
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DATED : MAY 05, 2006.@@
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JUDGMENT : [PER D.G.DESHPANDE,J.]@@
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1.‰ These two appeals are arising out of a judgment dated 4th November 1988 passed by the VIth Additional Sessions Judge, Thane where original accused No.6 Ajit Mukund Joshi was found guilty of an offence punishable under section 467 of the Indian Penal Code and was sentenced to suffer R.I. for ten years and to pay a fine of Rs.5000/- i/d to suffer S.I. for six months. Other accused were acquitted of the offences under Sections 120-B, 364 r/w 34, 302 r/w 34 of the Indian Penal Code, so also the original accused No.6 was also acquitted of all those offences. Therefore, the State has filed Appeal vide Criminal Appeal No.141 of 1989 against acquittal of the accused and, Original Accused No.6 filed Appeal vide Criminal Appeal No.985 of 1988 against his conviction under Section 467 of the Indian Penal Code.

2.‰ The case of the prosecution, on the basis of which the aforesaid impugned judgment came to be delivered, is as under :-

.‰ One Shri D.L.Marathe was the person who came to be murdered between 9 to 9.30 p.m. on 13.2.1987 and who was occupying a room in building known as Vinodwadi CTS No.26-C, situated at Ghantali, Naupada, Thane. Original owner of the said building was one Vinod who died in 1984. After his death, his widow Saraswatibai and three sons including Ganesh (PW 6) became the owners of the said property. By an agreement dated 14.6.1985 the said property was entrusted for development with M/s.Nishit Builders and Developers, Thane. There were four partners of the said firm. One of them was original accused No.6 Ajit Joshi. All these persons including accused No.6 and one K.B.Pangaonkar were negotiating with all the occupants of Vinodwadi for accepting alternate accommodation in the proposed construction either on tenancy or on ownership or to give their rights by accepting monetary advantage. The said property Vinodwadi was consisting of two buildings or chawls having 32 tenements in all. Deceased D.L.Marathe was in occupation of a room bearing Room No.1 as a tenant in one of these two buildings. One Mukund Sant (P.W.2) was in occupation of room No.2

adjoining to the room occupied by deceased Marathe.

3.‰ According to the prosecution, deceased Marathe was insisting that in the new premises he should be given space equally to one in occupation. The builders including accused No.6 were refused to do so and, therefore, they conspired together with the help of others to eliminate Mr.D.L.Marathe and also to get a document pertaining to surrender of tenancy right executed from Marathe either by coercion or by whatever means possible.

4.‰ On the date of incident 13.2.1987 accused had hired one rickshaw of Arun Teli (PW 3) between 8 to 8.30 p.m. This hired rickshaw was done by accused Nos. 2 to 5. This rickshaw was reached at Jambhali Naka at about 8.45 p.m. from where another rickshaw of Dilip Pathakji (PW 1) came to be hired on the pretext that an old person was to be taken to hospital.

5.‰ Then accused Nos. 1, 3 and 5 sat in the rickshaw of Dilip Pathakji and accused Nos. 2 and 4 sat in the rickshaw of Arun Teli (PW 3). He turned hostile in his evidence). He was asked to led his rickshaw on old Bombay Agra Road and Dilip Pathakji was asked to follow him. Both these rickshaws were stopped at the end of by-lane leading to Shubhamkaroti Hall, near New English School. The accused who were sitting in the rickshaw of Dilip Pathakji (PW 1) got down and went towards the by-lane and within a short time they came back lifting victim D.L.Marathe. He was forcibly dumped in the rickshaw of Dilip Pathakji. Then P.W.1 Dilip Pathakji was forced to drive his rickshaw at the point of knife on his back.

6.‰ On the way, victim Marathe was crying and shouting that he should not be assaulted and be relieved. Dilip Pathakji was threatened not to turn behind and to proceed ahead. When the rickshaw reached at the junction of Edulji road, Dilip Pathakji (PW1) noticed blood stains on the wind-screen of his rickshaw. He, therefore, stopped his vehicle and asked the accused persons to engage another rickshaw. Immediately he left his rickshaw, crossed the road and waited for the accused to get down from his rickshaw. When he returned back within a few minutes, the accused persons ran away and deceased Marathe was lying in a pool of blood in his rickshaw.

7.‰ In the mean time, when deceased Marathe was being lifted and taken in rickshaw, one Alka Bhaghwat (PW 3), who was residing opposite to Vinodwadi, gave a ring to the police control room and gave a message that one man was being lifted forcibly. Therefore, PSI Choudhari from Naupada

Police Station, who got the message, rushed to the spot. By that time, Dilip Pathakji (PW 1) had brought the victim Marathe to that spot near Shubhamkaroti Hall in a injured condition. Then as per the advice of PSI Choudhari, PW 1 Dilip Pathakji took victim Marathe to Civil Hospital where he declared dead. Thereafter Dilip Pathakji lodged a FIR vide Exhibit 17 to the Naupada Police Station. The matter was investigated. Incriminating articles from Dilip Pathakji or from his rickshaw were seized under a seizure panchanama. Blood stained earth and blood from the junction of Edulji Road was collected. Denture as well as pair of chappal of deceased Marathe, lying in rickshaw, was also seized.

8.‰ On the next day morning, accused Nos. 1, 3 and 4 were arrested along with accused No.2. Their clothes were recovered, so also accused No.6 was arrested. The clothes of deceased Marathe were also recovered under a panchanama. Statements of witnesses were recorded. Specimen of handwriting of accused No.6 was taken under panchanama. Knife was recovered at the instance of accused No.1 and other documents, necessary for investigation, were also collected and seized. Articles were sent to the Chemical Analyzer. Hand Writing of Marathe and the specimen of hand writing of accused No.6 were also sent to hand writing expert because it is revealed during investigation that accused No.6, in particular, was claiming that deceased Marathe had executed a document of surrender vide Article 23. After receiving reports of C.A. and Hand Writing Expert, a charge sheet was filed and the charges were framed by the Sessions Court.

9.‰ The prosecution examined 18 witnesses in order to prove guilt of the accused. The defence of the accused was of total denial and, according to accused No.6, deceased Marathe had executed Article 23 in his presence and in the presence of attesting witnesses and there was no forgery. The trial Court disbelieved the prosecution case so far as conspiracy and murder is concerned. But the trial court found that accused No.6 only was guilty under Section 467 of the Indian Penal Code and convicted him and acquitted others as stated above. Hence these two appeals.

10.‰ The trial Court acquitted the accused of the charges of murder and conspiracy on the ground that P.W.1 Dilip Harihar Pathakji, though had given full description of the incident, he did not name any of the accused in his evidence, though he had given their names in the FIR along with description. Therefore, according to the trial Court, this evidence of P.W.1 was of no use to the prosecution.

11.‰ The evidence of Alka Ramchandra Bhagvat (PW 3), who immediately informed the control room, was also, according to the trial Court, of no use in identifying the accused. Admittedly, P.W.5 - Arun Teli turned hostile fully and did not support the prosecution at all. Therefore, his evidence was not rightly considered. Regarding forgery by accused No.6, the trial Court found him guilty, but for want of other evidence acquitted all the accused of the charges of conspiracy and murder etc. as per the judgment of the trial Court.

12.‰ So far as death of Marathe is concerned, it was not challenged before us by the accused that Marathe died homicidal death. There were as many as 19 injuries on his person and, they were ante-mortem and, therefore, it has to be taken for prosecution as proved that Marathe died homicidal death.

.‰ Learned APP for the State contended that the trial court erred in acquitting the accused of the charges of conspiracy and murder. According to him, the evidence of P.W.1 and 3 coupled with the fact of forgery of document by accused No.6 was sufficient for the court to come to conclusion about existence of conspiracy and, in any case, those of the accused, who were travelling of P.W.1 Dilip Pathakji, were liable to be convicted because number of injuries on the person of deceased Marathe clearly shows that he was assaulted by all three persons travelling in that rickshaw.

13.‰ As against this, learned counsel for the accused contended that if P.W.1 Dilip Pathakji was unable to name the accused in his evidence before the Court and, when admittedly, the FIR cannot be used as a substantive piece of evidence, naming of accused in the FIR by P.W.1 is of no consequence and, in the absence of identification, the accused were rightly acquitted.

.‰ So far as accused No.6 is concerned, it was strenuously urged before us by learned counsel for the accused that there was no evidence of conspiracy and it was proved that Marathe had signed Article 23 before his death. He also pointed out that the evidence of hand writing expert was not conclusive to come to the conclusion that it was accused No.6 who had forged the signature of Marathe and, therefore, according to him, the State appeal was liable to be dismissed and, the appeal filed by accused No.6 was liable to be allowed.

14.‰ Since the conspiracy is main thing in this case, because it gives motive to the accused, according to the prosecution, it is

necessary to find out what the evidence of conspiracy is ? It is an admitted fact that and, there is no challenged that Marathe was occupying one of the rooms in Vinodvadi, that building was previously owned by one V.N.Vinod and after his death his widow Saraswatibai and three sons including Ganesh (PW 6) became the owners of the said property. It is also an admitted, and not disputed, fact that by an agreement dated 14.6.1985 the said property was entrusted for development to M/s.Nishit Builders and Developers, Thane, and accused No.6 was one of the partners with other partners K.B.Pangaonkar, Kantilal Manilal Bauva, Kantilal Manilal Shah etc. There is also no dispute that the builders were negotiating with the tenants in the said property for getting the property vacated by giving them alternate accommodation or compensation. About the attitude of Marathe, we will have to go through the evidence on record. The prosecution has examined P.W.2 Mukund Sant who was also residing at Vinodwadi. He has stated that the property was previously owned by one V.N.Vinod and after his death his son Rajiv was managing the said property and one year before his deposition in Court the property was given for development to one Nishit Builder of whom the aforesaid partners were there including accused No.6 Ajit Joshi. He has also stated that accused No.6 was used to visit the work on site and also collect the rent from the tenants. Some of the tenants had left the tenements by accepting money from the builder. This witness P.W.2 was tenant in room No.2 which was adjoining to Room No.1 where deceased Marathe was staying. It means, this P.W.2 was the direct and most nearer neighbour of deceased Marathe. Marathe was unmarried. P.W.2 further stated that accused No.6 or Pangaonkar of Nishit Builders used to hold talk with tenants about vacating or shifting the premises. He also stated that Marathe told him that accused No.6 Ajit Joshi was visiting to Marathe in that connection and a proposal was given to deceased Marathe for shifting in the premises of one Patvardhan, but Marathe told P.W.2 that he was not inclined to accept that proposal because the premises offered to him were comparatively lesser area. Marathe also told him that he asked Joshi to give his proposal in writing and that Marathe should not be disturbed and harassed again and again on that count. Then this witness (PW 2) stated about some incident, which will be discussed subsequently.

.‰ Cross examination of this witness (PW 2) does not show that this part of his testimony is wrong. Certain omissions were brought on record. But those omissions do not affect the main testimony that Nishit builders were, for getting the premises vacated, approaching each of the occupants with different promises and, Marathe was not ready to accept the promise given

to him.

15.‰ P.W.4 Dattatray Pralhad Karve, who was relative of deceased Marathe i.e. Marathe was the son of his maternal aunt. He has stated that in June 1986 Marathe told him that the property Vinodvadi was given by the landlord to the builder and one Joshi, the partners of the firm, was looking after the work of development. This witness (PW 4) also stated that Joshi used to see Marathe in this connection and Marathe was fade up with the frequent visits of Joshi and told him that Joshi should give him in writing whatever proposal was. The witness, thereafter, stated that in November 1986, Marathe told him that Marathe had received a letter from builder asking him to shift in the premises of Patvardhan but Marathe had refused the said proposal on the ground that he should be given premises of equal dimension which were occupied by him. Then this witness supports the incident that took place at night about which P.W.2 Mukund Sant has stated. We will be discussing that incident separately. Thereafter this witness (PW 4) has stated that Marathe told four days after the said incident that Joshi - accused No.6 had come to see Marathe and Joshi expressed his shock about the night's incident. Witness states that Marathe expressed doubt and suspicion against Joshi as a person behind that incident.

.‰ In the cross examination also the main fact that the builder was insisting upon Marathe and others for vacating the premises is not at all challenged or disputed. Omissions are brought on record but they are of no consequences so far as this aspect of the matter is concerned.

16.‰ The prosecution has examined the owner of the property Ganesh Vinayak Vinod (PW 6). He has stated about his ownership of the property, his agreement with Nishit builders on 14.6.85 and that, notice issued by the builders to the tenants. He has proved one of the last notice. He identified the hand writing of D.L.Marathe at Exhibit 23. He has stated thereafter about the meeting of the tenants and the owners including he himself and his brother; then giving of letter to the tenants on 16.6.1985; serving of the notice upon other tenants including Marathe and signature of Marathe at Exhibit 24.

.‰ Then this witness (PW 6) has stated that on 13.2.1987 at about 8 to 8.30 p.m. Ajit Joshi - accused No.6 (the builder) came to him and told him that Marathe was going to vacate the premises on that day itself. Then again between 9 to 9.30 p.m. Joshi accused No.6 came and showed him an agreement and asked him whether Ganesh (P.W.6) would sign it as witness. It was an agreement purported to be executed by Marathe in favour of builder. P.W.6 Ganesh signed the

document as a witness in good faith. But he has categorically stated that deceased Marathe did not execute the document in his presence. In this manner Article 23 came on record. He admitted his signature and specifically stated that signature of D.L.Marathe on the said document was not done in his presence.

.‰ Cross examination of this witness is not resulted in disproving the prosecution case to the effect that V.N.Vinod and after his death his widow and three sons were the owners of the property Vinodvadi where deceased Marathe was living; the property was given for development to Nishit Builder of which accused No.6 was partner; that builders were insisting upon the occupants to vacate the premises and they had approached Marathe for this purpose, offering a block in the premises of one Patvardhan and Marathe had refused to vacate his premises on the ground that the Patvardhan's premises were lesser in area. The evidence of these three witness also shows that Marathe was disgusted with the frequent visits and that aattempts were being made to frighten him.

17.‰ This aspect of the matter, giving rise to the strong motive for the builder, has not been considered by the trial Court in proper perspective. In fact no importance at all is given by the trial Court to this aspect which has resulted in mis-appreciation of fact of miscarriage and justice.

18.‰ Once it comes on record, as stated above, that Marathe was reluctant to vacate the premises and was fade up with the persuasion by the builders, then the story of prosecution regarding motive and conspiracy needs to be considered. At this juncture Article 23 plays a vital role. Because it is an agreement obtained by the builder - Accused No.6 and it purported to have been signed by Marathe at two places in token of having execution of agreement and having received Rs.50,000/-.

19.‰ So far this Article 23 is concerned, it is this witness Ganesh (PW 6) who has given the evidence in Court. He was very specific and assertive in stating before the court that when the agreement was signed by him as a witness Marathe was not present, that Marathe did not execute the agreement in his presence and, Joshi - accused No.6 represented that it was signed by Marathe. In fact this witness has stated that he raised his objection before Joshi about the signature of Marathe, because witness knew that Marathe used to sign in Modi script. However, Joshi told him (PW 6) that Marathe had signed the document and it was the signature of Marathe. This witness (PW 6) has also stated that the transaction of payment of Rs.50,000/- to Marathe,

as per Article 23, did not take in his presence.

20.‰ It is pertinent to note that Article 23 is dated 13.2.1987 . Signature of Ganesh (PW 6) was obtained on it between 9 to 9.30 p.m. and, murder of Marathe took place on the same night of 13.2.1987. If Marathe had really and in fact signed this agreement and received Rs.50,000/-, then there was no need for the accused No.6 for any kind of apprehension that Marathe will not vacate the premises. But if Marathe had not signed Article 23 and it is forged regarding signature of Marathe then that gives strong motive for the accused to enter into conspiracy for eliminating Marathe Because attitude of Marathe was of resistance and in any event it would be proper to presume that the builders wanted Marathe to vacate the premises at any costs.

21.‰ When witness P.W.6 - Ganesh has clearly stated that Marathe did not sign in his presence in either of the two places on the document; that Marathe was not present at that time and no transaction of giving Rs.50,000/- to Marathe took place in his presence, then burden heavily shifts upon accused No.6 to prove that Marathe had executed the document (Article 23), that Marathe had signed it on two places and that Rs.50,000/- was given to Marathe by accused No.6.

22.‰ The Prosecution has examined one Subhash Dattatraya Dabke (PW 8). However, he turned hostile obviously because accused No.6 Ajit Joshi was his brother in law. Joshi - accused No.6 was running a xerox-typing centre. This witness (PW 8) was working there as a typist. His real younger sister was given to accused No.6. He was examined because, according to the prosecution, and earlier statement to the police by this witness in which he had stated that on 13.2.1987 accused NO.6 came to his residence and told him that settlement had arrived at between him and Marathe and, that he signed Article 23 at Sr.No.2 as witness at the instance of Joshi. He contradicted with his earlier statement. In the cross examination on behalf of accused No.6, this witness (PW 8) admitted that on 13.2.1987, at about 8.15. p.m. when Joshi was present in the shop, Marathe had came there, signed Article 23 in his presence and Joshi paid him Rs.50,000/-. These admissions, brought out in the cross examination of this witness, are of no use to the defence. Firstly because witness is closely related to accused No.6. Secondly, he has turned hostile and resile completely from his earlier statement.

.‰ So far as cross examination of P.W.6-Ganesh is concerned, certain omission was brought on record with reference to his statement that he could not assign any reason for the

omission in his statement before the police that he told accused No.6 Joshi about disparity in signature of Marathe on said document Article No.23 as it was usual practice of Marathe to sign in Modi script. In the cross examination there is one more suggestion which is denied. But the suggestion is very important wherein the witness denied that he had not signed Article 23 as witness in good faith and he signed it because he was sure that it bears signature of Marathe. There is no suggestion at all to this important witness by any of the accused and particularly accused No.6 that he signed the document in presence of Marathe or that in his presence Rs.50,000/- were given to Marathe.

23.‰ Statement of Accused No.6 under Section 313 of the Criminal Procedure Code was recorded by the trial Court. He was confronted with the evidence of P.W.6.that neither Marathe signed the document nor received Rs.50,000/- and, accused No.6 told the witness P.W.6 that Marathe signed the document and it was signature of Marathe. To this question, accused No.6 replied that it is true and he had obtained signature of P.W.6 by going to the house of P.W.6. When Question No.39 was put to accused No.6 as, whether accused No.6 wants to say anything more?, accused No.6 nowhere told, when this document was obtained from Marathe in the presence of both these witnesses and in their presence Rs.50000/- were paid to Marathe. Last Question was put to accused No.6 as Question No.42 that as per the evidence of P.W.6 Ganesh, accused No.6 had gone to the house of P.W.6 Ganesh at about 8 to 8.30 p.m. and told him that Marathe was going to vacate the premises on that day only. This was admitted by accused No.6.

24.‰ It is pertinent to note that accused No.6 did not examine anybody in his defence in order to show that Article 23 was a genuine document signed by Marathe voluntarily and Marathe received Rs.50,000/- from him. P.W.8 Dabke - the attesting witness was admittedly in relation to accused No.6 and he has turned hostile, therefore, his admissions are of no use. P.W.6 Ganesh, who is one of the important attesting witness, was not cross examined when document Article 23 was produced by accused No.6 to him and no transaction of Rs.50,000/- took place in his presence.

25.‰ All these bring the prosecution case to a point where entire burden now shifts to accused No.6. He has miserably failed to discharge his burden. He had neither examined any defence witness nor in the cross examination of P.W.6 or other witnesses he could prove the signature on Article 23 to be of Marathe in order to further fortify his case that this document Article 23,

so far as it relates to signature of Marathe at two places, is not forged. This document was sent by police to hand writing expert. The said hand writing expert has given his opinion and, the prosecution has examined him as P.W.15. He is Vishwas Vinayak Ranjangaonkar. It has to be noted at this juncture to the nature of document sent to the hand writing expert (PW 15). All these documents were annexure of Exhibit 45 which is a forwarding letter. Under that letter the hand writing expert received one agreement, one receipt book, and 19 loose documents. Article 23 was the said agreement. As per this letter (Exhibit 45), Questioned Document No.1 was the agreement dated 13.2.1987 (subsequently marked it as Article 23). Signature of accused No.6 was encircled as Q.No.2. Signature of D.L.Marathe on the said agreement was referred to as Q.No.3 was encircled in red. Then documents in the hand writing of accused No.6 were sent. They were at Sr.Nos.1 to 8. Then documents bearing signature of Marathe were sent from N.1 to N.9. Four questions were posed before the hand writing expert. They are as under :-

1. Whether the signatures and hand writing on Q.No.1 and Q.No.2 is identical to the signatures and hand writing on S.No.1, S.No.3, S.No.5, S.No.6 (i.e the documents bearing real and genuine signature of accused No.6) or otherwise?

2. Whether the signature on Q.No.1 and Q.No.3 is similar to N.1 to N.7 or otherwise ?

3. Whether the signature on Q.No.2 is identical to the signatures on N.8, S.2, S.4, S.7, S.8 or otherwise ? and

4. Whether the signatures on Q.No.1 and Q.No.3 are identical to signatures & handwriting on S.1, S.3, S.5, S.6 or otherwise ? (i.e. the hand writing of accused No.6).

.‰ In his evidence the hand writing expert (PW 15) gave his opinion as under :-

‰ The red encircled signatures marked Exhibits Q-1 and Q-3 are not written by the writer, who wrote Ex.N-1 to N-7.

‰ The red encircled signatures Marked Ex.Q-2 is written by the writer who wrote Ex.S-2, S-4, S-7, S-8(a), to S-8(3) and N-8.

‰ The hand writing expert (P.W.15) was unable to express any definite opinion

as regards the identify or otherwise of the signatures marks Exs. Q-1 and Q-3 with the signatures marked Exs. S-1, S-3, S-5(a) to S-5(c), S-6 and N-9 for want of sufficient identifying characteristics.

.‰ From the aforesaid opinion it is clear that both the signatures of Marathe on Article 23 were not made by him. Signature of Joshi (Accused No.6) was tallying with the writing who wrote S-2, S-4, S-7, S-8 (a) S-8 (c) and N-8 and the hand writing expert (PW 15) was unable to express any definite opinion regarding identity or otherwise of the signature marked Q-1 and Q-3 with the signature marked S.1, S.3,S.5(1) S.6 and N9 for want of sufficient identifying characteristics.

26.‰ Apart from this opinion, we have perused the original agreement (Article 23). It is clear that the signature of D.L.Marathe was copied down with carbon and then it was duplicated in ink.

27.‰ The counsel for the accused tried to contend that the opinion of hand writing expert (PW 15) cannot be accepted because of inability of hand writing expert to conclude for want of sufficient identifying characteristics. Our attention was also invited to other cross examination of this witness.

28.‰ However, the fact remains that accused No.6 was to be benefited by agreement article 23. Accused No.6 was insisting upon Marathe to vacate the premises and to agree to the terms of the builders; that Marathe was refusing to concede to those terms; that Marathe did not sign the agreement Article 23, and no payment was made by Joshi accused No.6 to Marathe on that day.

29.‰ These conclusions definitely lead to only inference based on facts that Agreement (Article 23) is a forgery committed by accused No.6 - Ajit Mukund Joshi and he was rightly convicted by the trial Court. No other inference is required, therefore, in his appeal challenging that conviction.

30.‰ A perusal of Article 23 shows that Marathe has, upon receipt of Rs.50,000/- handed over vacant and peaceful possession of the premises Room No.1 and, neither he nor any one through him shall have right of the property as tenant and that his tenancy right have come to an end because of surrender and he has handed over vacant and peaceful possession of the premises to the builder. Accused No.6 has signed on behalf of M/s.Nishit Builder and then there is Marathe has given his acknowledgement of receiving Rs.50,000/- from the builder in cash.

31.‰ However, the matter does not end there. Once the trial court comes to the conclusion that accused No.6 has indulged in forging the signature of Marathe in order to create false, concocted and fabricated document to suit his purpose, the story of prosecution for conspiracy is required to be tested in this background.

32.‰ Conspiracy can be proved by proving different circumstances and then putting them together. From the evidence discussed above, in addition to the circumstances already discussed above, following things do support the prosecution case about conspiracy.

33.‰ P.W.2 Mukund Sant was residing in Room No.2 and was a neighbour of Marathe. We have discussed some of his evidence earlier, but his further evidence relates to a night incident which took place one and half months prior to murder of Marathe. This witness has stated that at about 12.00 midnight, 2/3 persons came in their property making enquiry about Marathe. The door of Marathe's room was knocked. Marathe opened the door and a talk took place in between them. He heard noise of knocking the door and the talk that was going on. He, therefore, got up; opened his door and came out his room and noticed that Marathe was talking with 2/3 persons. He saw the persons who were talking with Marathe. Accused No.1 was one of the persons. Then Marathe told this witness (PW 2) in their presence that those persons had called upon him informing that one B Shankar Tailor, the friend of Marathe, had met with an accident and that Marathe was called there. Witness (PW 2) stated that he was surprised by visit of these persons at odd hours of night and, therefore, he asked Marathe whether Marathe had such a friend and witness had showed his willingness to accompany Marathe. Then one of those three persons told Marathe that it was not for Marathe to go with them at that time, if Marathe had any difficulty and Marathe could see his friend in the morning. Thereafter those persons left. But then this witness and Marathe went to the house of B. Shankar Tailor and he was quite O.K. It is most surprising to see that even though this witness (PW2) was cross examined by all the accused not a single question was asked about this particular incident. In the cross examination, Para 9, this witness (PW 2) stated that he had enquired with Marathe immediately at that moment, when these persons had come to call him on the pretext of accident of his friend B. Shankar and, in the next reply, the witness (PW2) stated that he has not stated before police that Marathe had told him about the talk. Apart from this, there is absolutely not a single question

in the cross examination to challenge this testimony of the witness about the incident in night.

34.‰ Further there is one more witness examined by the prosecution in this regard. He is P.W.4 - Dattatraya Karve. He was related to Marathe as stated earlier. This witness stated that in the middle of January 1987 Marathe narrated to him the entire incident that had taken place and about which P.W.2 Mukund Sant has stated. Marathe also told him, how he was informed that Marathe's friend Tailor met with an accident, how PW-2 Sant woke up, expressed his surprise; how those persons insisted that Marathe should go alone and when PW-2 Sant insisted to accompany Marathe, how those persons ran away. Then Marathe also told this witness (PW 4) that thereafter he went to his friend Tailor along with Sant (PW 2)and Tailor was found sleeping at his house without any accident. Thereafter PW.4 Karve has stated that he told Marathe to be cautious and should not leave his residence alone at odd hours of night.

.‰ There is no cross examination to this this witness (PW.4) upon this point at all. An omission was tried to be brought on record about advise given by this witness to Marathe not to move at odd hours of night after the aforesaid incident. But apart from that, there is no admission to show that the evidence of this witness about this narration by Marathe is false. No other submission or argument was made regarding this part of the evidence of this witness (PW.4).

35.‰ It is pertinent to note here that M/s.Nishit Builders and Developers got right to this property of Vinodwadi by an agreement dated 14.6.1985 and all these incidents are subsequent thereto. The evidence of P.W.2 Mukund Sant is a direct evidence about the midnight incident and it shows that attempts were made by the builders to see that Marathe should vacate the room on some pretext or the other. The incident of night, referred to above, was a clear attempt to drag Marathe out of the house and, the intention was obvious though they did not succeed at that time to call out of Marathe of the room. Then trying to get shield of forged and fabricated document by accused No.6 coupled with all the circumstances discussed above clearly show that this was a conspiracy by the builders to firstly evict Marathe at any costs and by whatever means possible. Then we have to see, whether conspiracy of murder was there. For that we will have to refer to evidence of P.W.1.

36.‰ In fact, according to the prosecution, two rickshaw owners or drivers were involved, not in the conspiracy, but in the incident. But Arun

Teli (PW5) had turned hostile. Therefore, the evidence of P.W.1 Dilip Pathakji has to be considered.

37.‰ P.W.1 Dilip Pathakji is a rickshaw puller. He was running rickshaw owned by Kishor Chandrakant Jaywant. He has stated that on 13.2.1987 at about 8.45 p.m. he was standing in front of his house and chit chatting with his friends. At that time, Arun Teli came with his Rickshaw bearing No.MTT/1133 and asked him whether he was ready to carry an old patient to Manpada. P.W.1 refused but ultimately agreed to do so as Arun was his friend and an old patient was to be taken to Manpada. Thereafter, according this witness (PW.1), he brought his rickshaw on the road and from the auto rickshaw of Arun Tel three persons got down and got in his rickshaw. He show those three passengers who got in his rickshaw and Arun Teli asked him to follow. Ultimately rickshaw of Arun Teli was stopped at the beginning of by-lane leading to Shubhankaroti Hall. The three passengers, who were sitting in the rickshaw of P.W.1 got down from the rickshaw and went in the said lane and Arun Teli came near P.W.1. All those three persons returned within 5 to 10 minutes carrying one old person Marathe who was subsequently killed in his rickshaw.

38.‰ Thereafter this witness stated that Marathe was kept near the feet of passengers in his rickshaw. Arun Tel went to his rickshaw and occupants of rickshaw of this witness asked him to proceed towards Manpada. When Rickshaw of the witness came on main road i.e. Ram Maruti Road, he heard cries of old person and was sought of being released and not be beaten. P.W.1 stated that he was to stop the rickshaw near the hospital of Dr.Neela Paranjape due to cries of old person, but a knife was pointed to him from the backside and he was asked not to stop the vehicle, he, therefore, continued to drive his rickshaw and after taking it at different places, stopped the rickshaw near Edulji Road. He also noticed at that time the blood stains on the wind screen of his rickshaw in the light of vehicle coming from opposite direction. He took out the key of engine, that he told the occupants that they were doing something illegal and they should get down. At that time he saw rickshaw of Arun Teli standing ahead of his rickshaw near Makhmalai Tank. P.W.1 then crossed the road and stood by the said of the road, expecting the occupants to leave his rickshaw. After some time he came back and found that the passengers had disappeared. Marathe was lying in a pool of blood. P.W.1 then came back, brought his rickshaw near Shubhankaroti Hall and, one Inspector Choudhary and other persons were present there. He told Inspector Choudhary that the passengers in his rickshaw had killed Marathe

and ran away.

39.‰ Therefore, according to him, Inspector Choudhary advised him to take the old person to civil hospital. In the civil hospital, the doctor, who examined Marathe, declared him dead.

40.‰ Witness (PW1) stated that from the clothes of deceased one railway pass in the name of D.L.Marathe was found and the denture and one chappal were found lying in his rickshaw. Then this witness went to Naupada Police Station and lodged FIR (Exhibit 17).

.‰ In his further Examination-in-Chief, he gave description of those persons. But at the beginning of his evidence he stated that he does not know any of the accused person in the court hall. But in para 4, he has stated that accused No.1 might be one of those three persons so also accused No.2 and 3 might be out of those three passengers. He also stated that there were two passengers in the rickshaw of Arun Teli. He could not say whether those two persons were sitting in the court hall. He then identified Articles shown to him including chappal and denture, railway pass and, stated that his blood stained T Shirt was given to police and he identified same.

41.‰ Cross examination of this important witness for the prosecution is absolutely short and cryptic. He was not at all cross examined by accused No.6. No attempt was made to falsify him; attribute any motive to him and, it is clear that the defence remained contending upon his statement in Court that he does not know any of the accused present in Court.

42.‰ The trial Court disbelieved the evidence of this witness only on one ground that he was not knowing any of the accused in the FIR (Exhibit 17). This witness has given names of all the accused. But the trial Court held that the FIR is not substantive piece of evidence and, therefore, giving of names in the FIR cannot be of any help to the prosecution. There is no quarrel about this aspect of the matter that the FIR is not substantive piece of evidence. But at the same time it has to be noted that for that reason alone, i.e. not giving names of the accused in the Court, the evidence of this witness was not liable to be rejected. Firstly on the ground that P.W.1 is a totally independent eye witness. Secondly, he has lodged FIR immediately without any delay; thirdly, he himself had received small injury on his back, fourthly his T Shirt was stained with blood; fifthly there is absolutely no cross examination to falsify this witness about the murder of Marathe in his own rickshaw; sixthly even if this witness has stated that he was Arun Teli (PW

5) who took initiative in the manner stated above and played vital role, there is no cross examination on behalf of accused No.6 at all on this point and no suggestion that this witness (PW 1) was falsely dragging them in the incident. One thing is clear from this particular aspect that Arun Teli is a lier and is giving totally false evidence, otherwise this witness (PW 1) had no business to get involved in this incident.

43.‰ The fact that Marathe dragged and brought forcibly is also supported, though indirectly, by the evidence of P.W.3 Alka Bhagvat. She has stated that on 13.2.1987 between 9 to 9.15 p.m. she saw that two persons were forcibly taking one person towards rickshaw. The person so taken was 50 years of age. Property of Vinodvadi was situated opposite to her residence and since she got afraid of such forcible attempt, she made phone call to police on number 595959. Looking to the time given by P.W.1 and this witness, it is clear that the person so taken forcibly to Rickshaw was no other then deceased Marathe.

44.‰ From the evidence, that has discussed and the circumstances till this point, it is clear that the builder had entered into conspiracy to get possession and eliminate Marathe. This was done by them in night time. Ajit Mukund Joshi - Accused No.6 forged and fabricated Article 23 and Marathe was subsequently lifted from his house by three persons who were named in the FIR, but whose description was given in Court by P.W.1 stating that accused Nos. 1, 2 and 3 might be those persons. If this was the only evidence of the prosecution, then may be acquittal of these accused could have been said to be right. But that is not the end of the matter. Various incriminating articles have been recovered and that evidence is required to be considered at this stage.

45.‰ So far as discovery or recovery is concerned, (1) a knife Article 26 was discovered under Section 27 of the Evidence Act pursuant to the information given by the accused No.1. (2) Blood stained clothes were recovered from the possession of accused Nos. 1 and 2 when they were arrested; (3) Blood stained clothes were recovered at the instance of accused No.5 pursuant to the information given by him.; (4) Injury to the 4th finger of left hand of accused No.1. It is to be noted in this case that investigating agency has acted like lightening in this case. They got into action as soon as that lady Alka Bhagvat gave information that one old man was being lifted. The trial Court also noted that investigation was absolutely prompt without any delay in this matter. FIR was registered at about 10.30 p.m. on 13.2.1987. On the next day

morning accused Nos. 1 to 4 came to be arrested. On 16.2.1987 accused No.1 made a voluntary statement in respect of concealment of weapon namely knife. Panchas were called. Panchanama was prepared. Then police party was led by accused No.1 and ultimately under Memorandum (Exh.75), a knife was recovered. It was stained with blood. It was recovered from the hut of accused No.2. It has to be noted here that all the panchas turned hostile but that is not the reason to discard the testimony of police officer PI Chikhale who proved the statement of accused No.1 under Section 27 of the Evidence Act and also the subsequent recovery of blood stained knife. Even the trial Court found that the evidence of recovery of this knife or suri (Article 26) was worth of credence. But the trial Court held that no knowledge could be attributed to accused No.2 about concealment of such Suri in his hut. At this stage it has to be held that recovery of suri with blood stains at the instance of accused No.1 is proved. Then this knife was sent to the CA, as per the evidence of Investigating Officer PI Chikhale along with forwarding letter (Exhibit 80) and the C.A. report (Exhibit 81) discloses that human blood was detected on the same. Dr.Suresh Bhoite (PW 7) who performed post mortem, opined that the injuries noticed on the person of deceased Marathe were possible by suri or knife like Article 26. However, even after coming to this conclusion, the trial Court opined that such opinion will be of no assistance unless there is evidence substantive nature to show that the said suri was used in the offence. And according to the trial Court, Dilip Pathakji remained silent on this point of using of that particular knife by the assailants. This conclusion of the trial Court is absurd. If the accused were arrested immediately after the offence; if persuasion statement made by accused No.1 the knife was recovered; if the blood stains found on the clothes of the accused; the blood found is of human blood and the evidence of recovery is accepted, then that strong circumstance against the accused for which no explanation is there forthcoming. Admittedly and obviously, PW 1 Pathakji had no occasion to look behind and, the nature of Suri or knife with length and breadth shows and, the doctor, who performed the post mortem of Marathe, is also positive that this Article 26 could have caused all these injuries on the person of Marathe. Ultimately, the conclusion of the trial Court in this regard has to be rejected.

46.‰ Then as per the evidence of P.I. Chikhale (PW 18), accused Nos. 1 to 4 were arrested at 6.00 p.m. on 14.2.1987 immediately within 12 hours of murder. Their blood stained clothes were recovered. Full bush shirt (Art.10); terry cot full pant (Art.11)l; pair

of slipper (Art.12), all stained with blood were seized from accused No.1. Then tericot full pant (Art.13) and half bush shirt (Art.14) stained with blood wee recovered from accused No.2. No blood stains were found on the clothes of accused Nos. 3 and 4. Panchas turned hostile. But there is no reason to disbelieve this recovery of clothes of accused Nos. 1 and 2. Regarding this discovery, the Court on the one hand observed that not finding of blood stained clothes on the person of accused Nos. 3 and 4 reveals that recovery of blood stained clothes from accused Nos. 1 and 2 was genuine and not farce.

47.‰ As per C.A. report (Exhibit 81), the clothes of deceased Marathe were Articles 15, 17 to 19 and clothes of accused Nos. 1 and 2 were Articles 10, 11 and 13. Human blood of `AB" group was found on the clothes of accused Nos.1 and 2 where as blood coup of accused No.1 is "A" and blood group of accused No.2 could not be determined. Blood group of Marathe was "AB" and in any case immediate arrest of accused Nos. 1 and 2 with blood stained clothes and finding of human blood on their clothes is again a strong circumstances against them. This was accepted by the trial Court but even then the trial Court ultimately acquitted them of the charge of murder. Obviously this is a perversity on the part of trial Court.

48.‰ Further the Investigating Officer Chikhale proved that blood stained clothes Articles 27 and 28 were recovered as per the information given by accused No.5 on 26.2.1987 i.e. next day of his arrest. Human blood of "AB" group was detected on that clothes as revealed from the C.A. report (Exhibit 84). The C.A. report (Exhibit 88) also shows that blood group of accused No.5 was not "AB" but "A" group and that there was no explanation from any of the accused how the blood of deceased Marathe came on their clothes. The trial Court most surprisingly observed that though there was delay of 13 days in recovering the clothes from accused No.5, but that was not conclusive so as to exclude every hypothesis of his innocence.

49.‰ In addition, there was an injury on the fourth finger of the left hand of accused No.1. But according to the trial Court since age of injury is not there, no reliance could be placed upon that piece of evidence as a circumstance against the accused.

50.‰ The above discussion will clearly show that this was a case where the prosecution has succeeded in proving the conspiracy at the behest of accused No.6 Joshi and, regarding the direct assault , the evidence of P.W.1 Dilip Pathakji coupled with the evidence of recovery was sufficient. In spite of that the court held that

there was no evidence of conspiracy and, even though the blood stained clothes were recovered from the aforesaid accused, as stated, the court concluded that that was not sufficient to connect the accused with murder. We have no hesitation to hold that the trial court's judgment was fully perverse. At the one had it was accepted the evidence led by the prosecution but on the other hand by flimsy and trivial grounds it has acquitted the accused of the main charges. At this juncture it has to be mentioned that much emphasis is made by the trial Court about not mentioning of the names by the P.W.1 in the Court though all those names of the assailants were given in the FIR. We have discussed this aspect at length in past. In addition, it has come in the evidence of P.W.18 PI Chikhale that the resident of complainant Dilip Pathakji is near the Talavpali gate of St.John Baptist High School and the residence of accused Nos. 1 to 4 is within the said vicinity. The distance between Vinodwadi and the present residence of Vinod is about one furlong. There is absolutely no cross examination in this regard. The Investigating Officer has denied the suggestion that the distance between Vinodwadi and B-cabin is of four furlong and distance between vinodvadi and Makhamali talao is half kilometer. This distance gives credence to the prosecution story that P.W.1 was knowing the accused when he gave their names and description in the FIR. It is true that P.W.1 direct did name these accused in the statement but he gave description in the examination in chief and he has stated that accused could be those persons. Considering therefore all this evidence we find that the judgment of the trial court is perverse. The acquittal of the accused is wrong and, therefore, the appeal filed by the State has to be allowed.

51.‰ Therefore, from the aforesaid discussion, there is evidence against accused No.1 because at his instance knife was discovered and his blood stained clothes were also seized. There is evidence against accused No.2 because of recovery of blood stained clothes. There is evidence against accused No.5 because of recovery of blood stained clothes. They were arrested immediately. So far as accused Nos. 3 and 4 are concerned, no blood stained clothes were recovered from them and, therefore, considering all these facts in respect of accused Nos.1, 2, 5 and 6. So far as accused Nos. 3 and 4 are concerned, they are required to be acquitted. The Criminal Appeal No.985 of 1988 filed by accused No.6 Ajit Mukund Joshi is required to be dismissed.

52.‰ For all these reasons, we pass the following order :-

:ORDER:

‰ Appeal filed by accused No.6 Ajit Mukund Joshi vide Criminal Appeal No.985 of 1988 is dismissed.

‰ Appeal filed by the State against acquittal vide Criminal Appeal No.141 of 1989 is allowed so far as accused Nos.1, 2, 5 and 6 are concerned.

‰ These accused Nos.1,2,5 and 6 are found guilty under Section 120(B) of the Indian Penal Code. They are also found guilty under Section 364 read with 34 of the Indian Penal Code. They are also found guilty under Section 302 read with 34 of the Indian Penal Code.

‰ Accused No.6 Ajit Mukund Joshi is already convicted under Section 467 of the Indian Penal Code and he is sentenced to suffer R.I. for ten years. His conviction and sentence under that section is maintained.

‰ The Original accused Nos.1, 2, 5 and 6 are sentenced to imprisonment for life under Section 302 of Indian Penal Code.

‰ The Original accused Nos.1, 2, 5 and 6 are also sentenced to suffer R.I. for two years under Section 120-B of the Indian Penal Code.

‰ The Original accused Nos.1, 2, 5 and 6 are sentenced to R.I. for ten years and to pay fine of Rs.10000/- [Rupees Ten thousand only] each in default of payment of fine, they are sentenced to suffer further R.I. for one year under Section 364 r/w 34 of the Indian Penal Code.

‰ All these substantive sentences to run concurrently.

‰ The Appeal of the State being Criminal Appeal No.141 of 1989 against accused Nos. 3 and 4 is dismissed. The Accused Nos. 3 and 4 are on bail. Their bail bonds shall stand cancelled.

‰ The Original accused Nos.1, 2, 4, 5 and 6 are on bail. They should surrender before the trial court within eight weeks from today.

[D.G.DESHPANDE,J]@@

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[V.K. TAHILRAMANI,J]@@
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